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Copyright -- Infringement of Dramatico -- Musical Rights -- ASCAP License -- Robert Stigwood Group Ltd. V. Sperber

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Wherever the line is drawn, it will have important ramifications in labor activities. Where the Hobbs Act does not apply, the employee is saved from possible severe federal criminal penalties while the employer is forced to resort to the noncriminal remedies of the federal labor acts or to state criminal law for protection.

DAVID G. RIES

Copyright—Infringement of Dramatico-Musical Rights—ASCAP License—*Robert Stigwood Group Ltd. v. Sperber*.¹—The Robert Stigwood Group Limited (Stigwood) is the holder of the dramatic rights² to the opera *Jesus Christ Superstar*. Stigwood, in a suit alleging copyright infringement and unfair competition, moved for a preliminary injunction³ to enjoin the defendant, Original American Touring Company (OATC),⁴ (1) from performing the opera *Jesus Christ Superstar* or portions thereof; (2) from referring to *Jesus Christ Superstar* in advertisements for performances of musical compositions from the opera;⁵ and (3) from using the name "The Original American Touring Company" in conjunction with performances of the musical compositions.⁶

OATC, which performed twenty of the twenty-three songs from *Jesus Christ Superstar* in the identical sequence that they appear in the opera, with one exception, contended that these performances were permitted by its American Society of Composers, Authors and Pub-

¹ 457 F.2d 50 (2d Cir. 1972), modifying 332 F. Supp. 1206 (S.D.N.Y. 1971).

² The authors of the work *Jesus Christ Superstar* assigned the rights in the work (except "King Herod's Song") to Leeds Music Ltd., which copyrighted the entire opera as a "dramatico-musical composition" pursuant to 17 U.S.C. § 5(d) (1970) and several of the individual songs as "musical compositions" pursuant to 17 U.S.C. § 5(e) (1970). The individual musical compositions to *Jesus Christ Superstar* are protected by copyrighting the opera. 17 U.S.C. § 3 (1970). Leeds Music Ltd. assigned the United States copyrights to *Jesus Christ Superstar* and to the several individual songs to Leeds Music Corp. pursuant to 17 U.S.C. § 28 (1970). The separate rights and privileges arising from a copyright may be licensed. *First Financial Marketing Services Group, Inc. v. Field Promotions, Inc.*, 286 F. Supp. 295, 298 (S.D.N.Y. 1968); *Hirshon v. United Artists Corp.*, 243 F.2d 640, 643 (D.C. Cir. 1957). Stigwood acquired the rights for stage productions and dramatic presentations of the opera from Leeds Music Corp. 457 F.2d at 51-52.

³ *Robert Stigwood Group Ltd. v. Sperber*, 332 F. Supp. 1206, 1207 (S.D.N.Y. 1971).

⁴ "The Original American Touring Company" (OATC) is the name under which defendant booking agent, Betty Sperber, does business. The defendants put on concerts which are represented as being performed by the Original American Touring Company. The business details of the concerts are handled by Betty Sperber Management of which Betty Sperber is President. 457 F.2d at 52.

⁵ OATC was authorized to perform individual musical compositions to the opera *Jesus Christ Superstar* as a licensee of the American Society of Composers, Authors and Publishers (ASCAP). The ASCAP license permits the licensee to perform non-dramatic renditions of the separate musical compositions copyrighted by the members of the Society. OATC's license extends to the songs from *Jesus Christ Superstar* since Leeds Music Corp., from which Stigwood acquired its rights, is a member of the Society. *Id.*

⁶ 332 F. Supp. at 1207.

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lishers (ASCAP) license.⁷ ASCAP is authorized to license only the non-dramatic performing rights attaching to the musical compositions within its repertory,⁸ of which the individual songs from *Jesus Christ Superstar* form a part.⁹

The district court denied in part and granted in part the plaintiff's motion for a preliminary injunction. In particular, the court did not restrain the defendant from performing selections from *Jesus Christ Superstar* because, on the state of the record before the court, the plaintiff had failed both to present a prima facie case and to demonstrate a probability of success upon the merits.¹⁰ However, the district court did enjoin the defendant from identifying individual musical compositions with the opera, being bound to do so by a prior Second Circuit decision.¹¹ In contrast, the court expressly permitted OATC to

⁷ 17 U.S.C. § 1(e) (1970) grants to the copyright holder of a musical composition the exclusive right to perform the musical composition publicly for profit. ASCAP was created to assist member copyright holders in protecting this right. See Nimmer, Copyright 1955, 43 Cal. L. Rev. 791, 798 (1955). The ASCAP license reads in pertinent part:

(1) Society grants and licensee accepts . . . a license to publicly perform . . . non-dramatic renditions of the separate musical compositions copyrighted by members of the Society. . . .

(3) This license shall not extend to or be deemed to include:

(a) Oratorios, choral, operatic or dramatico-musical works (including plays with music, revues and ballets) in their entirety, or songs or other excerpts from operas or musical plays accompanied either by words, pantomime, dance, or visual representation of the work from which the music is taken; but fragments of instrumental selections from such works may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation (by motion picture or otherwise) of the work of which such music forms a part.

⁸ ASCAP is authorized to license non-dramatic performances only since the ASCAP membership felt confident that they could individually police dramatic performances of the musical compositions. Nimmer, supra note 7, at 798.

⁹ The individual songs of *Jesus Christ Superstar* are part of the ASCAP repertory because Leeds Music Corp. is a member of ASCAP. See note 5 supra.

¹⁰ The court relied on *Rice v. American Program Bureau*, 446 F.2d 685 (2d Cir. 1971). *Rice* held that

the presentation of *all* of the songs from the opera *Jesus Christ Superstar* without costumes, words, or scenery, but in sequence could arguably develop the overall plot of the opera, and thus it might possibly be "dramatic" or be a presentation of the opera in its "entirety." But we have *no proof of this here* and until there is proof, we cannot so hold.

Id. at 690 (emphasis added).

Similarly, the district court in *Stigwood* stated that

this is precisely the state of the record in this case. Plaintiffs merely offer conclusory statements asserting that defendants' concert performances, without costumes or scenery, result in dramatic renditions of "Superstar." For the purposes of obtaining a preliminary injunction this is insufficient. To obtain a preliminary injunction for infringement of a copyright a plaintiff must present a prima facie case and show a probability of success on the merits.

332 F. Supp. at 1208.

¹¹ In *Rice*, the Second Circuit ruled that "advertising or in any way representing any presentation as being from *Jesus Christ Superstar* or any song, instrumental selection or excerpt as taken therefrom in whole or in part" was forbidden. 446 F.2d at 690, cited in *Stigwood*, 332 F. Supp. at 1209.

identify the individual musical compositions by their respective titles.¹² Finally, the court refused to restrain the defendant from using the name "The Original American Touring Company," because the plaintiff had failed to demonstrate, for the purposes of obtaining a preliminary injunction, that the defendant's chosen name resulted in or was likely to result in public confusion in light of the Stigwood group name, "The National Touring Company."¹³

The Court of Appeals for the Second Circuit modified the district court's order and enjoined OATC: (1) from performing *any* song in such a way as to follow another song in the same order as appears in the opera; (2) from performing *any* songs from the opera accompanied by dramatic action, scenic accessory or costumes; and (3) from advertising or in any way representing either that any presentation of musical compositions is from *Jesus Christ Superstar* or that any song, instrumental selection or excerpt is taken therefrom in whole or in part.¹⁴ The court HELD: (1) the *story line* of the opera *Jesus Christ Superstar* is preserved by performing the individual musical compositions in almost the identical sequence in which they appear in the opera, thus making the composite performance by OATC "dramatic;"¹⁵ (2) the title *Jesus Christ Superstar*, as associated with the opera as a whole, has a "secondary meaning"¹⁶ rendering it a trade name and therefore outside the scope of the *Sears*¹⁷ and *Compco*¹⁸ doctrine;¹⁹ (3) the record disclosed insufficient evidence to demonstrate a likelihood of confusion in the public mind between the names "The Original American Touring Company" and "The National Touring Company" *in light of* the remaining provisions of the injunction.²⁰

The Second Circuit, in refining the definition of a "dramatic"

¹² 332 F. Supp. at 1209.

¹³ *Id.*

¹⁴ 457 F.2d at 56.

¹⁵ *Id.* at 55.

¹⁶ "Secondary meaning" has been explained in *G. & C. Merriam Co. v. Saalfeld*, 198 F. 369, 373 (6th Cir. 1912):

A word or phrase originally . . . incapable of exclusive appropriation with reference to an article on the market . . . might nevertheless have been used so long and so exclusively by one producer with reference to his article that, in that trade and to that branch of the purchasing public, *the word or phrase had come to mean that the article was his product*; in other words, had come to be, to them, his trade-mark. So it was said that the word had come to have a secondary meaning, although this phrase, "secondary meaning" seems not happily chosen, because, in the limited field, this new meaning is primary rather than secondary; that is to say, it is, in that field, the natural meaning. [Emphasis added.]

See also J. Calimafde, Trademarks and Unfair Competition (1970); Netterville & Hirsch, Piracy and Privilege in Literary Titles, 32 So. Cal. L. Rev. 101, 118 (1959).

¹⁷ *Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964).

¹⁸ *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964).

¹⁹ 457 F.2d at 56. For an explanation of this doctrine, see text at notes 81-117 *infra*.

²⁰ *Id.*

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performance in the context of underlying compositions to a "dramatico-musical" work, complemented prior approaches to the problem.²¹ The decision also bolsters the protection afforded to the holder of the dramatic rights in a dramatico-musical work. However, it appears that the part of the decision which deals with the use of the title *Jesus Christ Superstar* by OATC in its advertisements is overbroad and not in complete harmony with *Sears and Compco*.

This note will examine the protected status afforded by *Stigwood* to a copyrighted dramatico-musical work vis-à-vis performances of its underlying musical compositions. Discussion will focus upon defining a dramatic performance of a musical composition. Prior judicial constructions of the ASCAP license, which portray the judicial gropings for a concrete boundary for distinguishing dramatic from non-dramatic performances, will be analyzed. Finally, the court's resolution of the problem posed by affording judicial protection to the title *Jesus Christ Superstar* will be scrutinized in light of the doctrine enunciated by the Supreme Court in *Sears and Compco* and the constitutional requirements for copyright protection.²²

I. SCOPE OF THE ASCAP LICENSE

The primary question confronting the court in *Stigwood* was whether OATC's performance infringed upon Stigwood's dramatic rights; unless OATC's performance was "dramatic" it did not constitute an infringement. Since OATC held an ASCAP license and because it contended that the license authorized its performance, any definition of a "dramatic performance" requires an initial determination of the license's scope.

Section one of the ASCAP license grants to the licensee the right to perform non-dramatic renditions of the separate musical compositions from the dramatico-musical works copyrighted by its members.²³ Section three of the license, on the other hand, sets forth that which is not permitted by the license.²⁴ This section delineates certain restrictions which are tailored to instrumental selections²⁵ and others which are tailored to non-instrumental selections.²⁶

²¹ See *April Productions, Inc. v. Strand Enterprises, Inc.*, 221 F.2d 292 (2d Cir. 1955); *Rice v. American Program Bureau*, 446 F.2d 685 (2d Cir. 1971). See also M. Nimmer, Copyright § 125.6 (1972).

²² U.S. Const. art. I, § 8, cl. 8 provides:

The Congress shall have Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries.

²³ See note 7 *supra*.

²⁴ *Id.*

²⁵ "[F]ragments of instrumental selections . . . may be instrumentally rendered without words, dialogue, costume, accompanying dramatic action or scenic accessory, and unaccompanied by any stage action or visual representation . . . of the work of which such music forms a part." ASCAP license, § 3 (emphasis added).

²⁶ "This license shall not extend to or be deemed to include:

(a) . . . songs or other excerpts from operas or musical plays accompanied either

In *April Productions, Inc. v. Strand Enterprises, Inc.*²⁷ the Second Circuit in construing the scope of the ASCAP license focused on both sections one and three and then analyzed the interrelationship between these two sections. In construing section three, the *April* court contrasted the instrumental and non-instrumental provisions. By placing emphasis upon the use of the conjunctions "and" and "or" in these provisions the court found that while the phrase "of the work of which such music forms a part" in the instrumental provision modified *only* visual representations, the phrase "of the work from which the music is taken" in the non-instrumental provision modified *not only* visual representations but also *all* the terms in the provision.²⁸ Thus, the court placed a more comprehensive construction on the phrase "of the work from which the music is taken" in the non-instrumental provision than it did upon the phrase "of the work of which such music forms a part" in the instrumental provision. As a result, the court concluded that according to the license, while instrumental selections could not be accompanied by *any* "words," "dialogue," "costume," "accompanying dramatic action," or "scenic accessory," non-instrumental selections merely could not be accompanied by "words," "pantomime," or "dance" *from the original dramatic work* from which they were taken.²⁹

The court then went one step further and concluded that the language of the license also permitted non-instrumentals to be accompanied by words,³⁰ dialogue, costume, accompanying dramatic action or scenic accessory, since these elements were prohibited only in the case of instrumental selections and not in the case of non-instrumental selections.³¹

Looking at the interrelationship between section one and section three, the *April* court became perplexed by the paradoxical situation of a section one non-dramatic grant being coupled with a section three permit to perform non-instrumental selections in the accompaniment of certain dramatic material. As a result the court decided that the scope of the license was not "so narrow" as if it were defined by section one nor "so broad" as if it were defined by section three. Rather, the scope rested between these extremes and it was the task of the court to determine where it rested, on the facts of the case.³²

It is submitted that the above paradox is the result of too literal

by words, pantomime, dance or visual representation of the work from which the music is taken." ASCAP license, § 3 (emphasis added). However, the license does permit use of the lyrics of the particular songs. *April Productions, Inc. v. Strand Enterprises, Inc.*, 221 F.2d 292, 294 (2d Cir. 1955).

²⁷ 221 F.2d 292, 294-95 (2d Cir. 1955).

²⁸ *Id.*

²⁹ *Id.*

³⁰ It should be noted that the license used the term "words" in conjunction with both instrumentals and non-instrumentals.

³¹ 221 F.2d at 295.

³² *Id.*

an interpretation by the Second Circuit of the language in section three of the license. If the language in this section is interpreted both in the context of the license as a whole and in the light of the authority possessed by ASCAP as a licensor,³³ it becomes apparent not only that the phrases "of the work from which the music is taken" and "of the work of which such music forms a part" both refer merely to "visual representation" but also that the different dramatic elements enumerated in the non-instrumental and instrumental provisions were not meant to be exhaustive but merely particular examples of what is prohibited by the license.³⁴ In other words, section three is equally restrictive with respect to non-instrumentals and instrumentals alike, and the performance of neither may be accompanied by any dramatic material.

While section one is phrased in the positive language typical of a granting provision, section three of the license begins with prohibitory language.³⁵ It would be contorted reasoning to assume, in light of the negative character of section three, that it can bestow rights greater than those already given by the positive grant in section one.³⁶ Furthermore, ASCAP is authorized by its membership to license non-dramatic performances only.³⁷ Since ASCAP can grant no greater rights than these and since ASCAP explicitly made such a non-dramatic grant in section one, it would be anomalous to say that a more expansive definition for non-dramatic performances of non-instrumentals was intended by section three.³⁸ Thus, the true scope of the license is the "narrow" non-dramatic grant in section one, and section three is merely a particularization of what that grant implicitly disallows.

Since section three is a particularization of the non-dramatic grant in section one, it is noteworthy that nowhere does it prohibit rendering the separate musical compositions unaccompanied by any dramatic material in the sequence in which they appear in *Jesus Christ Superstar*. If section three had been construed as exhaustively enumerating the ways to present a dramatic performance, the ASCAP license would have proved woefully inadequate in *Stigwood*, since it would have permitted a rendition of all the component musical compositions in the

³³ ASCAP's authority is derived from its membership agreement. The pertinent part of the ASCAP membership agreement authorizes ASCAP to give:

1(b) The non-exclusive right of public performance of the separate numbers, songs, fragments or arrangements, melodies or selections forming part or parts of musical plays and dramatico-musical compositions, the Owner reserving and excepting from this grant the right of performance of musical plays and dramatico-musical compositions in their entirety, or any part of such plays or dramatico-musical compositions on the legitimate stage.

This language is set out in *Rice*, 446 F.2d at 686.

³⁴ For pertinent sections of the license, see notes 26 and 27 *supra*.

³⁵ For the text of the license, see note 7 *supra*.

³⁶ Cf. Nimmer, *supra* note 7, at 799.

³⁷ See note 33 *supra*. See also *Rice*, 446 F.2d at 689; cf. Nimmer, *supra* note 7, at 800.

³⁸ Cf. Nimmer, *supra* note 7, at 800. Furthermore, section 3 of the ASCAP license parallels subsection 1(b) of the agreement between ASCAP and its membership. 446 F.2d at 689.

precise sequence set forth in the opera. Fortunately, the Second Circuit in *Stigwood* refused to find section three to be exhaustive and proceeded to determine whether OATC's performances were dramatic and, therefore, in violation of the license.³⁹

II. STANDARD FOR DETERMINING WHEN A PERFORMANCE OF A MUSICAL COMPOSITION IS DRAMATIC

Thus, the question arises: What constitutes a dramatic performance of a musical composition? Several distinct standards have been proposed.⁴⁰ One approach defines dramatic performances by negative implication. Thus, a non-dramatic performance is deemed to be a rendition of a musical composition unaccompanied by dialogue, scenery, costumes and the like.⁴¹ This definition implies that renditions accompanied by these theatrical trappings are perforce dramatic performances.

A second standard tolerates a rendition as "non-dramatic" *unless* the rendition (1) occurs within an overall performance possessing a definite plot, and (2) the rendition is an integral part of *that* plot, *i.e.*, "helps to tell the story."⁴² This is ASCAP's official view as expressed in its standard television license agreement.⁴³ *April* apparently rests on this standard. The court, after concluding that its task was to determine on the facts of the case whether the rendition of non-instrumental compositions taken from a dramatic work and accompanied by words, dialogue, costumes, etc. was dramatic,⁴⁴ appears to have reasoned that the rendition in question was non-dramatic because it was *not* an integral part of the plot in the defendants' performance. The court held that even if the defendants put on a dramatic performance, the disputed renditions "were not part" of that performance but were merely an "Entr'acte."⁴⁵

A third standard, one which Professor Nimmer in his definitive treatise, *Copyright*, ascribes to *April*, is that a performance of a non-instrumental selection is dramatic only if accompanied by dramatic

³⁹ 457 F.2d at 53-54.

⁴⁰ See M. Nimmer, Copyright § 125.6, at 549-51 (1972) [hereinafter cited as *Copyright*].

⁴¹ Finkelstein, *The Composer and the Public Interest—Regulation of Performing Right Societies*, 19 Law & Contemp. Prob. 275, 283 n.32 (1954).

⁴² *Copyright*, supra note 40, at 549-50.

⁴³ See Timberg, *The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950*, 19 Law & Contemp. Prob. 294, 296 n.6 (1954).

⁴⁴ 221 F.2d at 295. See also text at note 31 supra.

⁴⁵ The court held:

Even if The Harem [defendant's nightclub] put on a dramatic performance, the selections from "The Student Prince" [the primary copyrighted dramatic work alleged to have been infringed] were not part of it. The worst that could be said would be that they were sung in an intermission between the acts of a dramatic performance.

Id. at 296.

material of the work from which it is taken.⁴⁶ In elaborating on this thesis, Professor Nimmer has reasoned that since the license grants only non-dramatic rights, *April*, in construing section three to permit non-instrumental selections to be rendered with certain dramatic material, necessarily defined a non-dramatic performance.⁴⁷

The difference between the actual holding in *April* and the holding attributed to that case by Professor Nimmer is merely one of degree, not kind. *April*, by apparently misconstruing the scope of the ASCAP license, concluded that non-instrumental compositions could be rendered with particular dramatic material under certain conditions, *i.e.*, when the renditions were *not* an integral part of an overall performance possessing a plot.⁴⁸ Professor Nimmer interpreted *April* as stating that non-instrumental compositions could be rendered with particular dramatic material unconditionally.⁴⁹

An accurate reading of the ASCAP license as prohibiting both non-instrumentals as well as instrumentals from being accompanied by *any* dramatic material⁵⁰ apparently renders both approaches moot. However, while the license may foreclose any need for determining when a performance of a musical composition accompanied by dramatic material is dramatic, such a need still exists with respect to other dramatic conduits such as "sequence"—which are not covered by the license. Therefore, the second standard (a performance of a musical composition is dramatic when it is an integral part of an overall performance possessing a plot) remains viable with respect to these other dramatic keystones. Consequently, it is important to note that this second approach has a serious shortcoming, namely, that it limits its concern to the story told by the borrowing work. One could perform a dramatico-musical work and during the performance present some of the musical compositions from a different dramatic work in such a way as to relate a portion of the latter's story without having that narrative become dramatic as an integral part of the former's plot. Such a possibility exists because the second standard, by requiring the rendition to be an integrant of an overall performance's plot,⁵¹ concerns itself only with the story being told by the borrowing work and not with the story line of the work from which the musical compositions were borrowed. This second criterion, however, would be sufficient to find OATC's performance of the *Jesus Christ Superstar* selections to be dramatic. Since the Second Circuit found that OATC performed twenty of the opera's twenty-three selections, all but one in the identical original sequence,⁵² and because the court found that the sequence

⁴⁶ *Copyright*, supra note 40, at 550.

⁴⁷ Nimmer, supra note 7, at 799-801.

⁴⁸ See notes 42-45 supra and accompanying text.

⁴⁹ See text at note 47 supra.

⁵⁰ See text at notes 33-38 supra.

⁵¹ See text at note 42 supra.

⁵² 457 F.2d at 55.

of performance was the dramatic linchpin in *Jesus Christ Superstar*,⁵³ the story in the OATC performance is substantially the same as the story in Stigwood's production,⁵⁴ and OATC's rendition of the *Jesus Christ Superstar* selections in sequence aided in telling that story. Thus, the second standard would suffice in *Stigwood* only because the plot of OATC's performance was substantially the same as the plot in Stigwood's production.

The Second Circuit in *Stigwood* recognized this shortcoming and as a result rested its decision on a criterion that would prevent even an essential portion of *Jesus Christ Superstar* from being performed: "Even the presentation of five or six songs could under certain circumstances, develop an essential portion of the drama, . . . thus infringing on a part of the opera."⁵⁵ The *Stigwood* court found the disputed rendition to be dramatic not because it was an integral part of the plot in OATC's performance, but because it aided in unraveling the story of *Jesus Christ Superstar*. The court stated that "the conclusion is inescapable that the story of the last seven days in the life of Christ is portrayed in the OATC performances substantially as in *Superstar*."⁵⁶ Thus, the test for a dramatic performance of a musical composition under *Stigwood* is not whether the rendition aids in telling the story of the borrowing dramatic work, but rather whether it aids in substantially telling the story—any essential part of the story—of the parent dramatic work. This approach alleviates the shortcoming in the second standard because it would categorize a rendition of musical compositions taken from a dramatic work as dramatic since the rendition told a portion of that work's story, in spite of the fact that it was not presented as an integral part of an overall performance's plot. This *Stigwood* standard affords the greatest degree of protection to the holder of the dramatic rights in a copyrighted dramatico-musical work vis-à-vis performances of its underlying musical compositions because it focuses directly on the source of the holder's interest, namely, the fountainhead dramatic work.

III. THE DRAMATIC CONDUIT IN *Stigwood*

In *Jesus Christ Superstar* the dramatic structure was not the conventional theatrical *mise-en-scène*, but rather the sequence in which

⁵³ Id. at 55-56.

⁵⁴ Id. at 55.

⁵⁵ Id. Note also that the court concludes that placing "a simple limitation on the number of selections which could be performed [would not] suffice" to prevent a dramatic rendition. Id. Thus the court rejects the approach taken by the district court in *Rice*, which enjoined the American Program Bureau from performing the opera save for "the singing of not more than two (2) of the individual musical compositions which have been separately copyrighted as musical compositions . . . or not more than two (2) other individual songs from the opera during any one concert." 446 F.2d at 685-86, setting forth the injunction issued by the district court, 335 F. Supp. 124, 128 (S.D.N.Y. 1971).

⁵⁶ 457 F.2d at 55.

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the songs were sung. The Second Circuit found that it was this which told the story and thus unfolded the drama. "The sequence of the songs seems to be the linchpin in this case."⁵⁷

The keystone concept of "sequence" is not new. As early as 1892 the Second Circuit in *Daly v. Webster*⁵⁸ realized that a particular series of visual events, apart from the dialogue, could be a dramatic composition. The crux of the court's view was that in plays of that type the series of events, in a certain sequence or order, was the only component of any importance.⁵⁹ Recent decisions have also recognized the role of sequence in the context of determining copyright infringement.⁶⁰ In *Rice v. American Program Bureau*,⁶¹ a case also dealing with the ASCAP license and *Jesus Christ Superstar*, the Second Circuit observed that a presentation of all of the songs from the opera in sequence, without costumes, words, or scenery, could arguably bring out the overall plot of the opera, and, therefore, be dramatic. However, on the scanty record before it, the court felt constrained to hold to the contrary.⁶²

At this point it would be beneficial to compare *Rice* and *Stigwood* for the purpose of observing that which precluded preliminary injunctive relief in the former but permitted such relief in the latter. The *Rice* record failed to show infringement of the copyright of *Jesus Christ Superstar*.⁶³ In *Stigwood*, decided on a fuller record,⁶⁴ the evi-

⁵⁷ Id.

⁵⁸ 56 F. 483 (2d Cir. 1892). In this case the owner of the copyright of the play entitled *Under the Gaslight*, a play owing its success to the novel nature of its principle scenes and incidents—especially the scene called the "railroad scene" in which a victim tied to railroad tracks is rescued from the clutches of an approaching train—sought an injunction against the defendants, claiming that a scene also known as the "railroad scene" in the defendants' play *After Dark* infringed his rights. The complaint stated that several of the plaintiff's scenes and incidents were used with slight variations, such as having the victim hanging over the tracks from the top of a tunnel rather than tied to the tracks, and having the rescuer break out of a wine cellar to perform the rescue rather than out of a switch house.

⁵⁹ In plays of this class the series of events is the only composition of any importance. The dialogue is unimportant, and, as a work of art, trivial. . . . Such a composition, though its success is largely dependent upon what is seen, irrespective of the dialogue, is dramatic. It tells a story which is quite as intelligible to the spectator as if it had been presented to him in a written narrative. The mere exhibition of mechanical appliances to represent incidents is not to be included within this classification. There must be a series of events, dramatically represented, in a certain sequence or order.

Id. at 486-87.

⁶⁰ See *Universal Pictures Co. v. Harold Lloyd Corp.*, 162 F.2d 354 (9th Cir. 1947). The Ninth Circuit concluded that defendant's motion picture photoplay, in which a substantial portion of the story of the copyrighted dramatic composition was preserved by the use of fifty-seven comedy scenes, representing twenty percent of the entire dramatic composition, in sequence, constituted an infringement. Id. at 360.

⁶¹ 446 F.2d 685, 690 (2d Cir. 1971).

⁶² Id.

⁶³ See text at note 62 supra.

⁶⁴ 457 F.2d at 54. The Second Circuit was presented with two exhibits: exhibit 3, which was a program of OATC's concert, and exhibit 4, which was a list of songs from

dence, which included a printed program of the OATC concert⁶⁵ and a list of the songs as performed in *Jesus Christ Superstar*,⁶⁶ did show infringement. A comparison of the program and the list readily established OATC's preservation of the original *Jesus Christ Superstar* sequence of performance.⁶⁷

IV. PROTECTION OF THE TITLE *Jesus Christ Superstar*

The Second Circuit in *Stigwood* interpreted OATC's desire to refer to the opera in its advertisements as further evidence of its intent to infringe.⁶⁸ As a result, although the first two parts of the injunction removed any danger of actual infringement,⁶⁹ the court felt obliged to affirm *Rice*⁷⁰ and to enjoin OATC from "advertising or in any way representing any presentations as being from *Jesus Christ Superstar* or any song, instrumental selection or excerpt as taken therefrom in whole or in part."⁷¹ The prohibition, however, does not extend to the use of the individual song titles in advertisements.⁷² OATC contended that this injunctive relief constituted improper protection of the title *Jesus Christ Superstar*.⁷³

The injunction in *Rice* prohibiting the use of the title *Jesus Christ Superstar* in advertisements rested upon the ASCAP license,⁷⁴ and the district court in *Stigwood* issued its injunction in response to the requirement of *Rice*.⁷⁵ Since the license excludes the performance of the dramatico-musical work, it might be interpreted as implicitly prohibiting advertising that a program consists of the dramatico-musical

Jesus Christ Superstar in the order in which they are performed. A comparison revealed that twenty of the twenty-three *Superstar* selections were performed by OATC in their original sequence. *Id.* at 54-55.

⁶⁵ Exhibit 3 listed the songs as follows: Overture; Heaven on their Minds; What's the Buzz?; Strange Thing Mystifying; Simon Zealotes; Pilate's Dream; The Temple; I Don't Know How to Love Him; This Jesus Must Die; Damned For All Time; The Last Supper; Don't Go; The Lord's Prayer; Gethsemane; The Arrest; Peter's Denial; Pilate and Christ; King Herod's Song; He's Gone; Judas' Death; Trial Before Pilate; Superstar; The Crucifixion. 457 F.2d at 54 n.4. OATC did not question the accuracy of this exhibit. *Id.* at 54.

⁶⁶ Exhibit 4 listed the songs as follows: Overture; Heaven On Their Minds; What's the Buzz; Strange Thing Mystifying; Everything's Alright; This Jesus Must Die; Hosanna; Simon Zealotes/Poor Jerusalem; Pilate's Dream; The Temple; Everything's Alright; I Don't Know How to Love Him; Damned For All Time/Blood Money; The Last Supper; Gethsemane; The Arrest; Peter's Denial; Pilate and Christ; King Herod's Song; Judas' Death; Trial Before Pilate; Superstar; Crucifixion; John Nineteen; Forty-One. 457 F.2d at 54 n.4.

⁶⁷ *Id.* at 54-55.

⁶⁸ *Id.* at 55.

⁶⁹ *Id.* at 56.

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ 446 F.2d at 687, 689, 690.

⁷⁵ 332 F. Supp. at 1209.

work or a part thereof;⁷⁶ but nowhere can it be said to prohibit referring to the title in advertising that a performance will include a musical composition taken from the opera.⁷⁷ Therefore, the underpinning for such injunctive relief must be found elsewhere, outside the ASCAP license.

The prevailing rule is that titles may not be protected by either common law copyright⁷⁸ or statutory copyright.⁷⁹ However, protection for a title may be provided by the law of unfair competition. The essential element required for such protection is that a "secondary meaning" attaches to the title.⁸⁰ Assuming the existence of a secondary meaning, however, the title may yet remain unprotected due to the theory of federal preemption enunciated in *Sears, Roebuck & Co. v. Stiffel Co.*⁸¹ and *Compco Corp. v. Day-Brite Lighting, Inc.*⁸²

In *Sears*, respondent Stiffel had obtained mechanical and design patents for a lamp. Sears began to manufacture and sell a substantially similar lamp. Stiffel brought suit in district court alleging patent infringement, appending an unfair competition claim under Illinois law. The patents were adjudicated invalid, but the district court, finding a likelihood of confusion arising from the substantial similarity of the lamps, held that under Illinois law Sears was guilty of unfair competition. The court enjoined Sears from "unfairly competing with" Stiffel, and ordered an accounting to fix profits and damages resulting from Sears' "unfair competition."⁸³ The Seventh Circuit affirmed, holding that Illinois law did not require a showing that Sears had "palmed off" its lamps as those of Stiffel and that a showing of likelihood of source confusion was sufficient.⁸⁴ Thus, Sears was held liable under Illinois law for copying and marketing the *unpatentable* Stiffel lamp. The Supreme Court reversed.⁸⁵

It is submitted that the following passage from *Compco* delimits the Supreme Court's holding in both *Sears* and *Compco*:

Today we have held in *Sears, Roebuck & Co. v. Stiffel Co.* . . . that when an article is unprotected by a patent or a copyright, state law may not forbid others to copy that article. To forbid copying would interfere with the federal policy, found in Art. 1, § 8, cl. 8, of the Constitution and in the im-

⁷⁶ See text of license, in note 7 *supra*.

⁷⁷ *Id.* It is possible to use the title *Jesus Christ Superstar* in an advertisement without giving the impression that *Jesus Christ Superstar* is being performed in whole or in part.

⁷⁸ *Jackson v. Universal Int'l Pictures*, 36 Cal. 2d 116, 121, 222 P.2d 433, 436 (1950).

⁷⁹ *Becker v. Loew's, Inc.*, 133 F.2d 889, 891 (7th Cir. 1943). Moreover, the regulations of the copyright office state that "name, titles and slogans" are not subject matter of statutory copyright. 37 C.F.R. § 202.1(a) (1972).

⁸⁰ See note 16 *supra*.

⁸¹ 376 U.S. 225 (1964).

⁸² 376 U.S. 234 (1964).

⁸³ 376 U.S. at 226.

⁸⁴ 313 F.2d 115, 118 (7th Cir. 1963).

⁸⁵ 376 U.S. at 233.

plementing federal statutes, of allowing free access to copy whatever the federal patent and copyright laws leave in the public domain.⁸⁶

Thus, what the federal law determines to belong to the public domain cannot be withdrawn by state law. In short, a state may not forbid the copying of that which is unpatentable or uncopyrightable.⁸⁷

However, some power was left to the states. *Sears* recognized that a state may require labelling just as it may protect businesses in the use of their trademarks, labels, or distinctive packaging so as to prevent others by imitation from misleading the public.⁸⁸ *Compco* recognized that a state can impose *liability* upon those who deceive the public by palming off their copies as the original.⁸⁹ Justice Harlan in his concurring opinion would go one step further and allow a state to prohibit the actual "copying" where the "dominant purpose" was to palm off.⁹⁰ Thus, *Sears* and *Compco* are attempting here, for the protection of the consumer, to distinguish between free competition and unfair behavior.⁹¹

Sears and *Compco* have been the subject of animated debate, and the scope of their impact upon the law of unfair competition remains less than certain.⁹² This seems due in part to the fact that commentators and writers have attempted to distinguish these controversial cases in an effort to reach what they believe to be fair results in particular situations. Therefore, it would be beneficial to examine some of the various interpretations placed upon the scope of these controversial opinions, concentrating upon the various ways in which they have been said to be distinguishable. Such an exercise will foster a better understanding of the way in which *Stigwood* dealt with these cases in extending protection to the title *Jesus Christ Superstar*, as well as provide a yardstick for measuring the relative merit of the *Stigwood* approach.

Professor Nimmer has suggested three possible ways for distinguishing *Sears* and *Compco* and extending protection to literary and musical titles.⁹³ The first Nimmer approach assumes that titles are

⁸⁶ 376 U.S. at 237.

⁸⁷ *Id.* at 238.

⁸⁸ 376 U.S. at 232.

⁸⁹ 376 U.S. at 238. However, *Compco* makes it clear that the states may not impose liability for or prohibit the *actual* copying regardless of the copier's motive. *Id.*

⁹⁰ *Id.* at 239. This concurring opinion applies to both *Sears* and *Compco*. *Id.*

⁹¹ See Bricker, *Thirty Months After Sears and Compco*, 14 *Bull. of the Copyright Soc'y* 293, 295 (1967).

⁹² See M. Nimmer, *Copyright* § 34 (1972) [hereinafter cited as *Copyright*]; Note, 6 *B.C. Ind. & Com. L. Rev.* 138 (1964); Bricker, *supra* note 91; Note, *The "Copying-Misappropriation" Distinction: A False Step in the Development of the Sears-Compco Pre-emption Doctrine*, 71 *Colum. L. Rev.* 1444 (1971) [hereinafter cited as *Copying-Misappropriation*]; *Developments in the Law—Competitive Torts*, 77 *Harv. L. Rev.* 888, 915-16 (1964); *The Supreme Court, 1963 Term*, 78 *Harv. L. Rev.* 143, 309-12 (1965).

⁹³ See *Copyright*, *supra* note 92, § 34.

not constitutional "writings."⁹⁴ Thus, Congress' failure to provide copyright protection for titles is a manifestation of a limitation of power rather than an affirmative policy in favor of allowing the copying of titles.⁹⁵ The second approach draws a distinction between source confusion and product confusion, that is, between a secondary meaning by which the copied work is identified by the public with a given manufacturer, as in *Sears*, and a secondary meaning by which the copied work, such as the title in *Stigwood*, is identified by the public with a particular literary work.⁹⁶ Thus, under this theory federal preemption in *Sears* and *Compco* is limited to situations involving copying and source confusion but not to situations which, although involving copying, solely embrace product confusion. This approach is questionable in that product confusion and source confusion overlap extensively and there does not seem to be any convincing reason for permitting one but not the other, since the public suffers in both instances. It has been explained that the main reason for the rule of "secondary meaning" is to protect the public and that the only factor that should sway courts from not leaving the plaintiff and the defendant where they stand is the desire to protect the public from confusion.⁹⁷ The third approach⁹⁸ contends that literary titles which have acquired a secondary meaning are, in effect, common law trade names,⁹⁹ and since the *Sears* exemption from federal preemption of state protection of trademarks and labels probably extends to trade names, titles to literary works may be protected *qua* trade names under a theory of unfair competition.¹⁰⁰ This line of argument is vulnerable in that the Supreme Court in *Compco* refused to protect Day-Brite's design notwithstanding the fact that the design "like a trademark" had acquired a "secondary meaning;" it stated that "if the design is not entitled to . . . federal . . . protection, then it can be copied at will."¹⁰¹

⁹⁴ Id. at 143-44. See U.S. Const. art. I, § 8, cl. 8.

⁹⁵ An exhaustive analysis of this approach is beyond the scope of this article.

⁹⁶ *Copyright*, supra note 92, § 34, at 144.

⁹⁷ *Netterville & Hirsch, Piracy and Privilege in Literary Titles*, 32 So. Cal. L. Rev. 101, 117 (1959).

⁹⁸ *Copyright*, supra note 92, § 34, at 144-45.

⁹⁹ Id. at 145, citing Restatement of Torts § 716 (1938).

¹⁰⁰ *Copyright*, supra note 92, § 34, at 145.

¹⁰¹ 376 U.S. at 238. In *Compco*, Day-Brite had secured a design patent on a new type of reflector. When *Compco*'s predecessor began selling similar fixtures, Day-Brite brought suit in district court alleging design patent infringement and unfair competition under Illinois law. The district court found the patent invalid; but, finding a likelihood of confusion arising from the similarity of the two fixtures, it held *Compco* guilty of unfair competition under Illinois law, and enjoined *Compco* as well as ordering an accounting for damages. The Court of Appeals affirmed, finding that a likelihood of confusion was sufficient for such a claim under Illinois law. 311 F.2d 26, 30 (7th Cir. 1962). The Supreme Court reversed, stating that while it may be true that the design of Day-Brite's fixture may have acquired a "secondary meaning" like a trademark by which that design was associated with Day-Brite, it could not be protected if it was not entitled to federal design patent protection.

Another commentator¹⁰² agrees that a title may be protected as a label, but thinks that *Sears* and *Compco* may have influenced the type of relief which should be granted. Proceeding upon the premises that an absolute injunction against the use of the title gives the same protection as a copyright and that no unfair competition exists where action is taken to prevent the likelihood of confusion, he contends that injunctive relief should be limited to injunctions requiring appropriate precautions to be taken in conjunction with the use of the title so as to prevent confusion.¹⁰³

Another method which has been employed to distinguish *Sears* and *Compco* is to draw a distinction between "copying" and "misappropriation."¹⁰⁴ The argument rests on the fact that while the Supreme Court addressed itself to copying, it failed to discuss misappropriation. Misappropriation, a doctrine which grew from the fact situation in the famous *INS* case,¹⁰⁵ comes into play when a party attempts to set forth another's goods as his own. The distinction between copying and misappropriation turns on the extent to which a competitor relies on the efforts of the original producer.¹⁰⁶ While the use of the distinction between "misappropriation" and "copying" as a means of distinguishing *Sears* and *Compco* has met with great support,¹⁰⁷ it has not been uni-

¹⁰² Bricker, *supra* note 91.

¹⁰³ *Id.* at 305-06. See also *Warner Bros. Pictures v. Majestic Pictures Corp.*, 70 F.2d 310, 312-13 (2d Cir. 1934), where the Second Circuit granted an injunction pendente lite permitting the defendants to use the words "Gold Diggers" in the title to their motion picture, *Gold Diggers in Paris*, provided they took proper precautions not to create public confusion with the plaintiff's work.

¹⁰⁴ *Copying-Misappropriation*, *supra* note 92, at 1444-45.

¹⁰⁵ *International News Serv. v. Associated Press*, 248 U.S. 215 (1918). In this case *INS* read AP's bulletins and early newspaper editions on the East coast of the United States, and, by using the telegraph to outstrip the time differential between the East and West coasts, was able to place the news in the hands of its readers at the same time, if not sooner, than newspapers served by AP could, without expending the effort or incurring the expense of gathering and investigating such news. The Supreme Court stated:

In doing this defendant . . . is endeavoring to reap where it has not sown Stripped of all disguises, the process amounts to an unauthorized interference with the normal operation of complainant's legitimate business precisely at the point where the profit is to be reaped, in order to divert a material portion of the profit from those who have earned it to those who have not; with special advantage to defendant in the competition because of the fact that it is not burdened with any part of the expense of gathering the news.

Id. at 239-40 (emphasis added).

It is interesting to note that while the doctrine espoused in *INS* has become a tool for distinguishing *Sears* and *Compco*, *INS* was decided before the advent of the pre-emption problem. *Copying-Misappropriation*, *supra* note 92, at 1445 & n.9.

¹⁰⁶ *Copying-Misappropriation*, *supra* note 92, at 1444-45.

¹⁰⁷ See, e.g., *Tape Indus. Ass'n of America v. Younger*, 316 F. Supp. 340, 349-51 (C.D. Cal. 1970), appeal dismissed, 401 U.S. 902 (1971); *Capitol Records, Inc. v. Erickson*, 2 Cal. App. 3d 526, 530-38, 82 Cal. Rptr. 798, 800-06 (1969), cert. denied, 398 U.S. 960 (1970).

versally accepted.¹⁰⁸ One commentator has criticized the use of this distinction, contending that the degree to which the misappropriator, as opposed to the copier, relies on the original producer's effort bears no relation to the policies underpinning the preemption doctrine in *Sears* and *Compco*.¹⁰⁹

The Supreme Court in *Sears*, looking to the Constitution¹¹⁰ and the statutes implementing it,¹¹¹ concluded that "the patent system is one in which *uniform* federal standards are carefully used to *promote invention* while at the same time *preserving free competition*."¹¹² The complication in *Sears* was that Illinois' protection of the Stiffel lamp upset the federal balance between promoting invention and preserving competition.¹¹³ Under the federal law the lamp could only be protected if it met a certain level of inventiveness,¹¹⁴ and even then it could only be protected for a *limited* time, the duration of which was calculated to encourage invention with a *minimum* amount of disturbance to competition.¹¹⁵ In contrast, Illinois, through its unfair competition laws, was extending protection of an *unlimited* duration to a lamp that lacked the requisite level of inventiveness to qualify for the limited federal protection. Thus, *Sears* and *Compco* enunciate a strong federal policy favoring free competition. However, these decisions, in an attempt to protect the consumer from being misled, left certain powers to the states,¹¹⁶ through a differentiation between unfair behavior and free competition.¹¹⁷ Thus, *Sears* and *Compco*, although proclaiming a federal policy in favor of free competition, temper that policy by attempting to protect against unfair behavior.

Stigwood concluded that the title *Jesus Christ Superstar* may have acquired a "secondary meaning," thereby giving it the characteristics of a label. Consequently, the court held that the title could be afforded protection under an unfair competition theory, not directly *qua* title, but incidentally, *qua* label, to "prevent deception to the public."¹¹⁸ Therefore, according to the Second Circuit, the title *Jesus Christ Superstar* fits within the *Sears* exemption for trademarks and labels.¹¹⁹

Whether *Stigwood* is justified or not must be determined according to the underlying policies of *Sears* and *Compco*.¹²⁰ Thus, the initial

¹⁰⁸ See *Columbia Broadcasting System, Inc. v. DeCosta*, 377 F.2d 315, 318 (1st Cir.), cert. denied, 389 U.S. 1007 (1967).

¹⁰⁹ *Copying-Misappropriation*, supra note 92, at 1462-63.

¹¹⁰ Art. 1, § 8, ch. 8.

¹¹¹ 17 U.S.C. §§ 1-216 (1970); 35 U.S.C. §§ 1-293 (1970).

¹¹² 376 U.S. at 230-31 (emphasis added).

¹¹³ *Id.* at 231-32.

¹¹⁴ *Id.* at 230. For a general discussion, see *Copying-Misappropriation*, supra note 92.

¹¹⁵ 376 U.S. at 230-31.

¹¹⁶ See text at notes 88 and 89 supra.

¹¹⁷ See text at note 91 supra.

¹¹⁸ 457 F.2d at 56.

¹¹⁹ See text at notes 88 and 98-100 supra.

¹²⁰ See text at notes 112-17 supra.

question becomes whether *Stigwood's* protection of the title disturbs the federal policy favoring free competition. The effect of the Second Circuit's ruling is to extend protection to a title which federal law leaves otherwise unprotected. Therefore, at first blush it appears that the decision is disturbing in that it brings about a degree of anti-competitive market control. However, *Sears* allowed trademarks and labels to be protected in spite of the resulting market control, in order to prevent the public from being misled. *Stigwood* similarly based its protection of the title on a desire to avoid public deception.¹²¹ If OATC used the title to deceive the consumer, extending protection to the title would be consonant with *Sears* and therefore proper.

The inquiry shifts, consequently, to ascertaining if deception would result from OATC's advertising. The first two parts of the *Stigwood* injunction foreclosed OATC from performing the opera;¹²² therefore, using the title in advertisements in such a way as to lead the public to believe that the opera was being performed would be deceptive. However, referring to the title in such a manner as to indicate that a performance merely includes some musical compositions from *Jesus Christ Superstar* would not be deceptive. It is submitted that the injunction in *Stigwood* was overbroad in that it prohibited even the latter use of the title. *Stigwood* enjoined OATC from "advertising or in any way representing any presentations as being from *Jesus Christ Superstar* or any song, instrumental selection or excerpt as taken therefrom in whole or in part."¹²³

In the context of the *Stigwood* case the consumer could be shielded by requiring OATC to observe appropriate precautions in conjunction with its use of the title. Thus, it would appear that the Second Circuit should have limited its injunction to prohibiting OATC, in advertising its concerts, from making such reference to the title as would cause the public to think that the advertised attraction was the opera itself.¹²⁴

CONCLUSION

The *Stigwood* decision represents the most comprehensive protection thus far afforded the dramatic rights in a copyrighted dramatico-musical work with respect to performances of the drama's underlying musical compositions. The Second Circuit, in determining whether OATC's performance of the component *Jesus Christ Superstar* musical compositions was dramatic, set forth the criterion that a performance of a musical composition from a dramatico-musical work would be dramatic if it substantially aided in telling the story of the parent dramatic work. The court, having found the sequence of performance

¹²¹ 457 F.2d at 56.

¹²² *Id.*

¹²³ *Id.*

¹²⁴ For an example of how such an injunction might be formulated, see *Warner Bros. Pictures v. Majestic Pictures Corp.*, 70 F.2d 310, 312-13 (2d Cir. 1934).

to be the dramatic conduit of the *Jesus Christ Superstar* story, and also having found this sequence of performance to be preserved in OATC's performances, enjoined OATC from performing any of the play's selections in such a way as to follow one another in their original sequence. Such a performance would tell the opera's story and therefore be dramatic.

Sears and *Compco* represent an attempt by the Supreme Court to distinguish between fair and unfair behavior. *Sears*, in spite of establishing a strong federal policy in favor of free competition by preempting from state law protection that which the federal patent and copyright laws leave unprotected, allowed trademarks and labels to be protected in order to prevent the public from being misled. *Stigwood*, upon concluding that the title *Jesus Christ Superstar* may have acquired a "secondary meaning," thereby becoming a label, extended protection to the title for the sake of preventing deception. While the title could be protected to prevent deception, it is submitted that the injunction in *Stigwood* was overbroad because it indiscriminately prohibited any use of the title in advertisements. OATC could not perform the opera, but it could perform the opera's individual musical compositions out of their original sequence. Consequently, it would appear that OATC's use of the title in advertisements could only be deceptive if it led the public to believe the opera itself was to be performed, but not if it induced the belief that the advertised performances would merely include some of the opera's component musical compositions.*

JOHN F. BRONZO

* As this Note went to press, the Supreme Court in *Goldstein v. California*, 41 U.S.L.W. 4829 (U.S. June 18, 1973), may have taken a step toward protecting literary titles under a theory based on state copyright laws. The *Goldstein* case involved a conviction for "record" and "tape" piracy under a California criminal statute. The Supreme Court upheld the conviction in a five-to-four decision in the face of persuasive arguments based on the copyright and supremacy clauses of the Constitution and the preemption doctrine of *Sears* and *Compco*. Chief Justice Burger, in delivering the majority opinion, reasoned that since the constitutional clause granting to Congress the power to issue copyrights does not provide either that such power should rest exclusively with the federal government or that such power should not rest in the states, and since Congress has not indicated either that it wished to protect, or to free from protection, the recordings in question, California was at liberty to extend protection to these recordings. *Sears* and *Compco* were distinguished on the basis that "[t]he standards established for granting federal patent protection . . . indicated not only which articles in this particular category Congress wished to protect, but which configurations it wished to remain free." *Id.* at 4836. The importance of *Goldstein*, according to Justice Marshall's dissent, lies in the fact that until this time *Sears* and *Compco* had been interpreted as creating a presumption that "congressional silence betoken[ed] a determination that the benefits of competition outweigh[ed] the impediments placed on creativity by a lack of copyright [or patent] protection" *Id.* at 4839.

This decision may be explained, as the dissent suggests, by the strong distaste that exists for "pirates." The majority takes great pains to stress that the California statute does not forbid the use of the music, lyrics or arrangements, nor does it proscribe the hiring of musicians to record an exact imitation, but merely disallows transferring any performance fixed on a tape or record onto other records or tapes

with the intention of selling the duplicates. Furthermore, federal protection for similar recordings "fixed" after a certain date had recently come into existence.

The closeness of this split decision reflects the mental "tug-of-war" that must have transpired between the justifiable distaste for piracy and the sober reality of the impact that such state protection would have on the objective of uniformity underpinning the preemptive doctrine of *Sears* and *Compco*. The result, while understandable in light of the particular fact situation, could foster confusion and lack of uniformity in the context of the state-federal relationship if future courts fail to exercise restraint in limiting this decision to its facts. Of course, Congress need only declare its intent to exercise exclusive control in the copyright field in order to resolve any such uncertainty that may develop.